

FEDERAL MAGISTRATES COURT OF AUSTRALIA

RAM v MINISTER FOR IMMIGRATION & ANOR

[2007] FMCA 1386

MIGRATION – Partner visa – whether jurisdictional error – interpretation of sub-regulation 1.15A(3) of the Regulations – genuine spousal relationship – domestic violence – whether admonishment of agent by Tribunal reasonable – hearing conducted in impeccable manner – whether actual or apprehended bias – application dismissed.

Migration Regulations 1994, reg.1.15A

Migration Act 1958, s.359

NAHI v Minister for Immigration and Multicultural and Indigenous Affairs

[2004] FCAFC 10

Zhang v Minister for Immigration & Multicultural & Indigenous Affairs [2005]

FCAFC 30

SHJB v Minister for Immigration and Multicultural and Indigenous Affairs

(2003) 134 FCR 43

Rezaei v Minister for Immigration and Multicultural Affairs [2001] FCA 1294

Ping & Ling v Minister for Immigration, Local Government & Ethnic Affairs

(1994) 35 ALD 225

Tran v Minister for Immigration and Multicultural Affairs; sub nom [2003]

FCA 44

Cahyana v Minister for Immigration and Multicultural Affairs [1998] 390 FCA

Habbabe & Anor v Minister for Immigration & Anor [2006] FMCA 163

Collins v Minister for Immigration [2003] FMCA 571

Guyen v Minister for Immigration [2006] FMCA 311

Webb & Hay v R (1994) 181 CLR 41

Refugee Review Tribunal, Re; Ex parte H (2001) 179 ALR 425

Minister for Immigration and Multicultural Affairs, Re; Ex parte Epeabaka

(2001) 206 CLR 128

Applicant:

PUSHPA LATA RAM

First Respondent:

MINISTER FOR IMMIGRATION &
CITIZENSHIP

Second Respondent:

MIGRATION REVIEW TRIBUNAL

File number: MLG 855 of 2006
Judgment of: McInnis FM

Hearing date: 18 January 2007

Date of last submissions: 22 February 2007

Delivered at: Melbourne

Delivered on: 17 August 2007

REPRESENTATION

Counsel for the Applicant: Ms R.M. Germov

Solicitors for the Applicant: A.D Solicitors

Counsel for the First Respondent: Mr W.S. Mosley

Solicitors for the First Respondent: Australian Government Solicitor

ORDERS

- (1) The Application be dismissed.
- (2) The Applicant shall pay the First Respondent's costs fixed in the sum of \$5,000.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MLG 855 of 2006

PUSHPA LATA RAM
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The Applicant seeks judicial review of a decision of the Migration Review Tribunal (the Tribunal) dated 2 June 2006. In its decision, the Tribunal affirmed a decision of a delegate of the First Respondent and found that the Applicant is not entitled to the grant of a partner (migrant) (class BC) visa, nor a partner (residence) (class ES) visa.
2. The Applicant is a female Fijian born on 16 January 1964. On 19 May 2003 the Applicant met a male Australian citizen, Kenneth Albert Van Essen, born 19 June 1964 ("the sponsor") in Fiji. On 8 September 2003 the Applicant and the sponsor married in Fiji. On 16 September 2003 the Applicant lodged a combined application for a spouse (class UF) visa, subclass 309 ("the temporary visa"), and a partner (migrant) (class BC) visa, subclass 100 ("the visa"). The Applicant was nominated by the sponsor. On 29 October 2003, the Applicant was

granted a temporary visa. The Applicant arrived in Australia on 27 November 2003.

3. On 6 June 2005, a delegate of the First Respondent refused to grant the Applicant the visa. The Applicant then applied to the Tribunal on 17 June 2005 seeking review of the delegate's decision. Further material was provided by the Applicant to the Tribunal. The Applicant sought to rely upon the domestic violence provisions of the *Migration Regulations 1994* ("the Regulations") and provided material in support of the allegations of domestic violence.
4. Further material was provided by the Applicant in response to an invitation by the Tribunal pursuant to s.359 of the *Migration Act 1958* (the Migration Act). The request from the Tribunal (Court Book p.112) in part stated:

"In reviewing your case, the Tribunal must assess whether you and your partner had a mutual commitment to a shared life as husband and wife to the exclusion of all others, and whether the relationship between you and your partner is genuine."

The Tribunal's decision

5. In its decision, the Tribunal recited the claims of the Applicant and listed the material provided in support of the application. It found that *"the relationship"* between the Applicant and the sponsor *"ended in June 2005"* (Court Book p.159). Significantly, the Tribunal found that the Applicant and the sponsor were not at any time in a spousal relationship that ceased within the meaning of subclause 100.221(4)(b). It found that whilst the parties were in a relationship of sorts, they were not in a spousal relationship as contemplated by subregulation 1.15A.
6. In reaching its conclusion, the Tribunal decided that before it was required to consider the Applicant's claims of domestic violence, it first had to be satisfied as to whether the Applicant and the sponsor had been in a genuine spousal relationship at any point in time. The Tribunal considered the evidence concerning the relationship prior to its cessation, including evidence given at the hearing. It considered the matters set out in subregulation 1.15A of the Regulations. That subregulation provides as follows:

“Spouse

(1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:

- (a) in a married relationship, as described in subregulation (1A); or*
- (b) in a de facto relationship, as described in subregulation (2).*

(1A) Persons are in a married relationship if:

- (a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
- (b) the Minister is satisfied that:*
 - (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) the relationship between them is genuine and continuing; and*
 - (iii) they:*
 - (A) live together; or*
 - (B) do not live separately and apart on a permanent basis.*

...

(3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:

- (ad) a Partner (Migrant) (Class BC) visa; or*
- (ae) a Partner (Provisional) (Class UF) visa; or*
- (af) a Partner (Residence) (Class BS) visa; or*
- (ag) a Partner (Temporary) (Class UK) visa;*

the Minister must have regard to all of the circumstances of the relationship, including, in particular:

- (a) the financial aspects of the relationship, including:*
 - (i) any joint ownership of real estate or other major assets; and*
 - (ii) any joint liabilities; and*
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
 - (iv) whether one party to the relationship owes any legal obligation in respect of the other; and*
 - (v) the basis of any sharing of day-to-day household expenses;*
- (b) the nature of the household, including:*
 - (i) any joint responsibility for care and support of children, if any; and*
 - (ii) the parties' living arrangements; and*
 - (iii) any sharing of responsibility for housework;*
- (c) the social aspects of the relationship, including:*
 - (i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;*
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) any basis on which the persons plan and undertake joint social activities;*
- (d) the nature of the persons' commitment to each other, including:*
 - (i) the duration of the relationship; and*
 - (ii) the length of time during which the persons have lived together; and*

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons see the relationship as a long-term one.

(4) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for a visa of a class other than a class specified in paragraph (3) (ad), (ae), (af) or (ag), the Minister may have regard to any of the factors set out in subregulation (3).

(5) If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason."

7. It will be noted that in subregulation 1.15A(3) there is a requirement that the Minister must "have regard to all of the circumstances of the relationship" including the following matters:

the financial aspects of the relationship;

the nature of the household;

the social aspects of the relationship; and

the nature of the persons' commitment to each other.

8. Each of those factors in the regulation requires a number of matters to be taken into account. The Tribunal considered each of the major headings. The Tribunal found, and it is not disputed, that the Applicant and the sponsor were married in Fiji on 8 September 2003 in a marriage recognised as valid for the purposes of subregulation 1.15A(1A)(a). However, the Tribunal was not satisfied that the parties had a mutual commitment to a shared life together, or that their relationship was genuine and continuing for the purposes of subregulations 1.15A(1A)(b) (i) and (ii) respectively.

9. In forming its view as to whether the parties were in a married relationship, the Tribunal as indicated then proceeded to make findings in

relation to the elements which are set out in subregulation 1.15A(1A)(3). There is no dispute that the evidence revealed that the two persons had lived together at the same address for six months or longer, and the Tribunal accordingly made that finding. Relevantly, however, it stated in its decision the following:

“67. The Tribunal has considered the evidence in relation to the parties’ commitment to each other as part of the totality of evidence in relation to regulation 1.15A. The Tribunal also notes that regulation 1.15A(5) provides that, if 2 persons have been living together at the same address for 6 months or longer (as the parties had), that fact is to be taken as strong evidence that the relationship is genuine and continuing.”

(Court Book p.160)

10. In its decision, the Tribunal relevantly referred to subregulation 100.221(4)(b) in considering its decision as to whether the parties were in a genuine spousal relationship. It is not necessary to set out that regulation in this judgment. It is useful, however, to set out the specific factors pursuant to subregulation 1.15A(3) considered by the Tribunal as follows.

Tribunal Decision - Financial aspects of the relationship, subregulation 1.15A(3)(a)

11. In its findings, the Tribunal noted that the parties did not own any real estate or purchase any major assets together. After the Applicant's arrival in Australia, she and the sponsor did not open a joint bank account together or incur any liabilities together. They maintained their own bank accounts into which salaries were paid, though noted the Applicant's claim that she and the sponsor pooled their income to pay the utilities and other expenses, and that she had authorised the sponsor to access her bank account in Fiji.
12. The Tribunal accepted the Applicant was assisting the sponsor to pay for daily expenses, but stated:

“... on the other hand, whilst not particularly significant, the maintenance of separate accounts is contrary to the financial

aspects of a spousal relationship as contemplated by Regulation 1.15A.”

13.

14. The Tribunal then went on to relevantly state,

“... In addition, the Tribunal notes that whilst the visa applicant authorised the sponsor to access her account and nominated him as a beneficiary to her superannuation fund, the sponsor does not appear to have reciprocated by allowing her access to his accounts or nominating her as a beneficiary. Though not determinative of the application, when combined with the evidence in relation to the nature of the household, the parties' limited social activity and the lack of emotional support provided by the sponsor to the visa applicant the evidence in relation to financial aspects of the relationship further bolsters the Tribunal's view that he did not at any stage have a genuine commitment to a shared life with the visa applicant.”

(Court Book p.159)

**Tribunal Decision - Nature of the household, subregulation 1.15A(3)
(b)**

15. When considering this factor, the Tribunal accepted the parties had lived together from the Applicant's arrival in Australia in late November 2003 until the relationship ended in June 2005, but then significantly found that it was *"not satisfied that the household aspects of the relationship reflect the household aspects of a spousal relationship as contemplated by Regulation 1.15A"*. The Tribunal then relevantly finds:

“62. The Tribunal notes that, whilst the visa applicant states that the sponsor was initially supportive and mindful of her needs, about two months after her arrival in Australia, he started inviting friends (she didn't like) over, drinking heavily and would not help out around the house. She found herself doing most of the domestic chores. She and the sponsor started to argue when she complained about his failure to do his fair share of the house work and other issues such as his drinking and the fact that his friends swore constantly, even in front of the sponsor's young children. The Tribunal has had regard to the visa applicant's assertion in her statutory

declaration of 16 May 2006 that she helped look after the sponsor children when they came to stay with them but, whilst this demonstrates some social integration into the sponsor's family, it is also consistent with an interpretation of the nature of the relationship as one in which the sponsor delegated work to the visa applicant rather than shared duties around the house.

63. *The Tribunal finds that, although the parties cohabited, the household aspects of the cohabitation do not reflect the household aspects of a spousal relationship as contemplated by Regulation 1.15A."*

(Court Book p.159)

Tribunal Decision - Social aspects of the relationship, subregulation 1.15A(3)(c)

16. The Tribunal referred to the Applicant's claim that her family welcomed the sponsor and the sponsor's family welcomed her. The Tribunal noted a statutory declaration of Marco Fran, and of the Applicant's sister, and correspondence addressed to the parties from friends. The statutory declaration of Marco Fran (Court Book pp.143-145) referred in some detail to the relationship between the parties. The Tribunal however concluded, when considering the social aspects of the relationship, the following:

"65. The Tribunal notes, however, that the sponsor's family did not attend the wedding in Fiji. The Tribunal further notes that, within a couple of months of her arrival in Australia, the sponsor demonstrated a lack of interest in socialising with her, preferring to drink and lounge in front of the TV by himself or with his friends rather than to go out socially with her.

66. *The Tribunal finds that the social aspects of the parties' relationship are equivocal and do not reflect the social aspects of a spousal relationship as contemplated by Regulation 1.15A."*

Tribunal Decision - Nature of the parties' commitment to each other, subregulation 1.15A(3)(d)

17. It is appropriate to set out specific findings of the Tribunal in relation to this matter which are clearly significant in the disposition of the application. In its decision, the Tribunal relevantly states -

- “67. *The Tribunal has considered the evidence in relation to the parties' commitment to each other as part of the totality of evidence in relation to the regulation 1.15A. The Tribunal also notes that regulation 1.15A(5) provides that, if 2 persons have been living together at the same address for 6 months or longer (as the parties had), that fact is to be taken as strong evidence that the relationship is genuine and continuing.*
68. *The Tribunal, however, also considers that Regulation 1.15A(3)(d) contemplates a close mutually supportive, emotionally connected relationship. Having reviewed the history of this relationship the Tribunal is not satisfied that mutual commitment and emotional support were ever evident in the relationship. The Tribunal is not satisfied that, at any point in time, the sponsor had a genuine commitment to shared life with the visa applicant in the sense contemplated by the Regulations.*
69. *The Tribunal notes that the parties met in April 2003 and socialised as friends. The sponsor then returned to Australia. The parties met again in September 2003 and married precipitously on 8 September 2003 having only spent a few days together on 8 September 2003 since their relationship started.*
70. *The visa applicant arrived in Australia in late November 2003. She asserts that the relationship was harmonious for the first two months. The Tribunal also notes, however, that the visa applicant stated in her oral evidence to the Tribunal at the hearing that the sponsor first assaulted her in December 2003, that is, within a few weeks of her arrival in Australia. (As indicated in paragraph 54 the relevance of this is limited to the issue of credibility and not whether the parties were ever spousal relationship). The inconsistency casts doubt on the credibility of the visa applicant's assertion that the relationship was trouble-free and harmonious for the first two months following her arrival in Australia. Even if it was, it quickly became apparent that*

they were not compatible and had fundamentally different expectations of each other; a product of not having spent substantial time in each other's company prior to getting married. The sponsor started to ignore her emotional needs, deny her his companionship and support and demonstrated a commitment to continuing his premarital lifestyle of socialising with his friends rather than a commitment to her. Whilst the parties continued to live together the relationship was characterised by arguments over house work and the visa applicant's dissatisfaction with the sponsor's behaviour. The Tribunal is not satisfied that the relationship ever gelled into a spousal relationship as defined. In light of the paucity of evidence of any social dimension to the relationship, the absence of evidence of shared household duties (on the contrary the visa applicant was expected to do the housework) and the sponsor's lack of support for and commitment to the visa applicant, the Tribunal finds that, whilst the parties were in a relationship of sorts, they were not in a spousal relationship as contemplated by regulation 1.15A." (sic)

(Court Book pp.160-161)

Grounds of application

18. In the application two significant issues arose. First, that jurisdictional error occurred in the Tribunal's interpretation of subregulation 1.15A(3) of the Regulations. Secondly, it was argued that a proper reading of the Tribunal's decision and the transcript of the proceedings together with hearing the tape-recording of those proceedings should lead to a conclusion that the decision of the Tribunal was not a bona fide exercise of the power, in that the conduct of the review by the Tribunal raised a reasonable apprehension of bias.
19. The particulars subjoined to the ground alleging jurisdictional error, when referring to the Tribunal misconstruing subregulation 1.15A(3) are:
 - “(i) *appears to have erroneously assumed that sub-regulation 1.15A(3) imposed a mandatory requirement that all the factors mentioned therein must be satisfied and corroborated by evidence in order for the Tribunal to find that a mutually committed spousal relationship existed;*

- (ii) *appears to have assumed that “mutual commitment” meant and “equal commitment” in all aspects of the spousal relationship;*
- (iii) *appears to have erroneously assumed that there was a minimum time during which a mutual commitment to a spousal relationship had to exist.*
- (iv) *failed to have regard to the impact of the cultural differences between the Applicant and her husband; and*
- (v) *impermissibly used the domestic violence alleged by the Applicant to make a finding that a mutual commitment never existed between the Applicant and her husband, such error being demonstrated by the Tribunal’s conduct of the review, in particular, its letter of 28 February 2006 requesting the Applicant to call her estranged husband, the alleged perpetrator of domestic violence, as a witness in the review proceeding.”*

20. It is claimed in the application that as a consequence of the alleged misconstruction of subregulation 1.15A(3), the Tribunal failed to take into account relevant considerations, namely:

- “(i) *The documentary evidence provided by the Applicant demonstrate the financial, social and personal commitment that existed between herself and her husband at the commencement of their marriage such evidence consisting of a statutory declaration from Marco Frau, photographs; utility bills, ATM cards, bank statements, superannuation statements and personal correspondence; and*
- (ii) *The Applicant’s claims and evidence concerning domestic violence allegedly perpetrated against her by her estranged husband.”*

Submissions

Applicant’s submissions - Subregulation 1.15A

21. It was submitted by the Applicant that the Tribunal must have regard to "all the circumstances of the relationship", including the factors set out earlier in this judgment in subregulation 1.15A(3). Reference was made by the Applicant to the First Respondent's policy guidelines set

out in the Procedures Advice Manual (the PAM) in relation to subregulation 1.15A. It was submitted that according to the PAM in relation to the subregulation, the decision-makers are required to decide "on balance" whether the marital relationship met the requirements of subregulation 1.15A(1A).

22. It was argued that the PAM stated the correct approach is to consider "each individual relationship against all listed factors and, taking into account any other relevant information presented by the Applicant, deciding whether on balance the requirements of the relevant Regulations are met." It was submitted the Tribunal failed to comply with the guidelines, as it allegedly ignored the evidence before it when considering the Applicant's relationship against the factors in subregulation 1.15A. It was submitted a failure to take properly into account the relevant considerations may constitute jurisdictional error.
23. At one point during the submissions, it was noted that a delegate of the First Respondent had assessed the Applicant's marriage as genuine in relation to an earlier visa application.

Financial aspects

24. The Applicant submitted that despite making findings that the Applicant assisted the sponsor to pay for daily expenses, he specifically made a finding that the maintenance of a separate bank account is "contrary to the financial aspects of a spousal relationship as contemplated by regulation 1.15A". It was submitted there is nothing in the wording of the regulation that requires married couples to have joint bank accounts. The regulation includes a range of financial arrangements which can be considered, and the items mentioned, it was submitted, are not intended to be exhaustive.
25. It was argued the Tribunal appears to have construed the reference to pooling of financial resources as requiring joint financial accounts or commitments for all financial matters. It was submitted the Tribunal appears to have overlooked evidence from the Applicant that she and her husband had access to each other's bank accounts and PIN numbers (Supplementary Court Book p.11 lines 42-43).

Nature of household

26. The Applicant submitted that the Tribunal's decision strongly raises an inference that it construed "mutual commitment" as meaning "an equal commitment in every respect". It was submitted that is an error of law, and there will be occasions in a marriage where one party will rely more on the other.
27. Reliance was placed upon a decision of the Federal Court in *Tran v Minister for Immigration and Multicultural Affairs; sub nom* [2003] FCA 44 (Tran), where the court in that case considered mutual commitment in relation to a marriage involving a couple where one party was schizophrenic. Whilst it was conceded that the present case is not similar in terms of there being any serious illness, it was argued that there was evidence before the Tribunal to the effect that the sponsor was a heavy drinker who took a rather "traditional" approach to marital duties.
28. Submissions were made that it may be common with many contemporary Australian males, including the sponsor, that he would leave the housework to his wife. The Tribunal, it was argued, misconstrued that as inconsistent with the spirit of subregulation 1.15A(3)(b). It was implicit in the Tribunal's findings, according to the Applicant's submissions, that it took the view that the Applicant was treated like a servant, flatmate or other hired help, even though according to the submissions, "It is well known that women, whether or not they work full-time, bear the burden of household chores, as they do in most other countries in the world for that matter."
29. The Tribunal, it was argued, appears not to have taken into account that fact, or social and cultural factors that could have influenced the behaviour of the Applicant and the sponsor. The conduct of the sponsor, sitting on the couch and watching sport on television while drinking with friends, it was argued, cannot be equated with a lack of any intention to have a mutual commitment to married life with the Applicant.
30. The Tribunal, it was submitted, failed to have regard to the extent of the Applicant's knowledge of her husband's life and family arrangements, which she was able to describe in considerable detail at

the hearing. It was submitted the Tribunal did not have proper regard to photographic evidence produced to it by the Applicant.

Social aspects

31. The Applicant submitted that it is clear from the photographs together with other documents including statutory declarations that the Applicant and her husband were in a genuine marital relationship and planned many social activities together. In the submissions it was stated, "It is impossible to understand what the Tribunal found equivocal about this evidence." That presumably was a reference to that part of the decision set out earlier in this judgment where it states, "The Tribunal finds that the social aspects of the parties' relationship are equivocal and does not reflect the social aspects of a spousal relationship as contemplated by regulation 1.15A." Reference was made to the evidence at the Tribunal and the photographs produced.

Nature of commitment

32. It seemed to be common ground that subregulation 1.15A(5) has the effect that if two persons have been living together at the same address for six months or longer then that fact "is taken to be strong evidence that the relationship is genuine and continuing". The Applicant submitted, however, that the Tribunal in its findings failed to properly apply that subregulation when considering the mutual commitment contemplated by subregulation 1.15A(3)(d). Criticism was made of the Tribunal's finding that the parties had married in haste. It was submitted that the length of time that a couple cohabited is a relevant consideration that should not be lightly dismissed.
33. Some reliance was placed upon a decision of the Federal Magistrates Court in *Habbabe & Anor v Minister for Immigration & Anor* [2006] FMCA 163 (Habbabe), where the court held the Tribunal had committed a jurisdictional error by failing to ask itself the correct question namely, What was the future intention of the parties? It was submitted in the present case the Tribunal failed to have regard to the parties' efforts to resolve their difficulties, and made no findings about what was described as significant evidence in the statutory declaration of Mr Marco Fran.

34. Criticism was made of the Tribunal's reference to the domestic violence evidence. To understand that criticism, it is useful to set out the following relevant paragraphs where the Tribunal, after referring to decisions of this court in *Collins v Minister for Immigration* [2003] FMCA 571 and *Guyen v Minister for Immigration* [2006] FMCA 311, relevantly states:

“53. *The Tribunal acknowledges that, in adopting this approach, it must exclude from consideration any claimed domestic violence in assessing whether the parties were in a spousal relationship pursuant to regulation 1.15A at the time of the incidents of claimed domestic violence. The incidents of the emotional, psychological and physical violence relied on as domestic violence may themselves be the impediment to an applicant demonstrating a genuine sharing of finances, a genuinely spousal household, the parties’ social interaction as spouses and companionship and support between the parties; all factors to be taken into account in assessing whether the parties were in a spousal relationship pursuant to regulation 1.15A. To consider the claimed domestic violence in assessing whether the parties were in a spousal relationship pursuant to regulation 1.15A at the time of the incidents of claimed domestic violence would effectively render the domestic violence provisions of Division 1.5 of the Regulation nugatory, since any relationship in which such violence was present could well be determined to be, for that reason alone, not genuinely spousal in character.*

54. *Whilst not relevant to whether the visa application can address regulation 1.15A indicia of a spousal relationship at the time of the claimed violence, the evidence presented in relation to domestic violence forms part of the evidence and the Tribunal is entitled to have regard to it and to assess whether it is cogent and consistent in assessing the visa applicant’s credit generally, including the credibility of her claim that she and the sponsor were in a spousal relationship pursuant to regulation 1.15A at some point in time.”*

(Court Book pp.156-157)

35. It is also relevant to note in the same context paragraph 70 set out earlier in this judgment, where cross-reference is made to paragraph 54.

36. The Applicant submitted that the Tribunal did not “*make any findings about the Applicant’s credit*”.

First Respondent’s submissions – Subregulation 1.15A

37. The First Respondent submitted that in general terms, the question of whether a person is a "spouse" is a question of fact. It was argued the Tribunal's reasons disclose that it considered the matters made relevant by subregulation 1.15A(3) and weighed up the evidence on each of those aspects in determining it was not satisfied the Applicant was in a spousal relationship as at the date of its decision.

38. It was argued by the First Respondent that the Tribunal was not required to refer to each specific item of evidence relied upon by the Applicant in order to complete its jurisdictional task. Reference was made to the Full Court of the Federal Court decision in *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10, where the court stated at [14]:

“14 ... *The Tribunal was not obliged to comment on every item of material before it, to the extent of saying why it rejected a particular item, or attributed less weight to it than to another item.*”

39. Although it was noted that the Tribunal had considered the matters referred to under each of the subheadings of subregulation 1.15A(3), it was submitted that it was not required to make express findings about each of those matters (see *Zhang v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 30 at [20]).
40. The First Respondent submitted that the Applicant's complaints concerning the Tribunal's consideration of the matters arising under subregulation 1.15A (3) were essentially seeking merits review.
41. The First Respondent submitted that in making the findings, the Tribunal was not required to accept the Applicant's claims uncritically, and nor was it required to have rebutting evidence available to it (see *SHJB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 43).

42. The First Respondent submitted that the court should take into account what is meant by a "relevant consideration" as described by Allsop J in *Rezaei v Minister for Immigration and Multicultural Affairs* [2001] FCA 1294, where the court states at [57] the following:

"57 ... Yusuf does not stand for the proposition that a relevant consideration has not been taken into account and the decision-maker thereby has failed to embark on or complete his or her jurisdictional task merely because some piece of evidence which the court thinks is relevant in the evidential or probative sense can be seen not to have been weighed or discussed. "Relevant" for this purpose means that the decision-maker is bound by the statute or by law to take this into account: Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986) 162 CLR 29 at 39-42 ..."

Financial aspects

43. The First Respondent submitted that the reference to the maintenance of separate bank accounts is only part of the statement, to the effect that maintenance of accounts is contrary to financial aspects of the spousal relationship as contemplated by subregulation 1.15A. It was submitted the Applicant failed to refer to the Tribunal's specific statement immediately preceding this, to the effect that it accepted that this was not a particularly significant matter.
44. It was submitted further in any event that it was a matter that the Tribunal could take into account in its overall assessment of the relationship, but the reference, it was submitted to the joint bank account, was open to the Tribunal when considering whether the parties had any joint ownership of major assets and the extent of pooling of financial resources. Reference was made to paragraphs 58-60 of the Tribunal's decision referred to earlier in this judgment, where the Tribunal considered the financial aspects of the relationship.
45. It was further submitted that the Tribunal did not overlook the evidence regarding mutual access to accounts and PIN numbers. The Tribunal, it was submitted, referred to the fact that the Applicant had authorised the sponsor to access her account. In any event, it was submitted that it is not a jurisdictional error for the Tribunal to fail to refer to a particular

piece of evidence (see *Ping & Ling v Minister for Immigration, Local Government & Ethnic Affairs* (1994) 35 ALD 225).

Nature of the household

46. The First Respondent submitted that the present case can be distinguished from the decision of the Federal Court in *Tran*, as in that case the court was considering a situation where one of the parties was suffering from a mental disability, and the relationship was to be judged in the light of that disability. The fact that the sponsor it was submitted may have been a heavy drinker and took a rather "traditional approach" to marital duties, was not the type of situation confronting the Federal Court in *Tran*.
47. Further, it was submitted that in any event the Tribunal did not interpret "mutual commitment" as requiring an "equal commitment" in every respect. There is nothing in the Tribunal's decision to support the inference that the Applicant sought to draw in relation to this matter.
48. It was noted that subregulation 1.15A(3)(b)(iii) specifically refers to the concept of "any sharing of responsibility for housework". It was submitted there was no error in the Tribunal considering the evidence before it in relation to the sharing of the responsibility for housework, as it is directed to do so by that regulation. The Tribunal considered other matters, including the extent to which the Applicant helped in looking after the sponsor's children of his previous relationship, which was also a matter relevant under subregulation 1.15A(3)(b)(i) of the Regulations.
49. It was submitted the evidence relating to the circumstances of the relationship was a matter for the Tribunal. Again, it was submitted that the Applicant's contentions seek merits review or seek to persuade the court that the Tribunal should have taken a different view of the evidence before it. Reference was made to the decision of Tamberlin J in *Cahyana v Minister for Immigration and Multicultural Affairs* [1998] 390 FCA, where the court stated:

"On the hearing before me, the applicant re-emphasised the genuineness and closeness of his relationship with the visa applicant and his deep-seated concern that the IRT had not taken

this matter into account. He stressed the depth and extent of his emotional commitment to a shared life with the visa applicant.

It appears to me, that the gravamen of the complaint by the applicant is a concern with the merits of the matter and the weight given to the evidence by the IRT. It is not the role of this Court to review the merits of the IRT decision. Having examined the reasons for decision in the light of the material placed before me, I am not persuaded that the IRT has erred in any way in principle, law or in relation to the evidence in reaching its conclusion."

Social aspects

50. The First Respondent submitted that the Tribunal's finding on the evidence in relation to social aspects was equivocal and followed the Tribunal weighing up the evidence in relation to this aspect. Again, it was submitted that the Applicant seeks impermissibly to undertake merit review and reach perhaps a different view of the evidence.

Nature of commitment

51. The First Respondent submitted that subregulation 1.15A(5) does not "mandate that the Tribunal find that a couple who have been living at the same address for 6 months or more are in a genuine and continuing relationship". That provision, it was argued, does not fetter the power of the Tribunal to determine the weight to be given to other evidence.
52. Reference to the case of *Habbabe*, it was submitted, was misconceived, as that case involved an adverse finding in relation to a different visa class, namely, a subclass 300 prospective marriage visa that required the decision-maker to be satisfied "that the parties genuinely intend to live together as spouses". This is not a criterion for the Tribunal to consider in the present case. It was submitted the Tribunal considered evidence in relation to the incidents of disharmony between the parties and was not required to make specific findings as contended by the Applicant in relation to the evidence including the statutory declaration of Mr Marco Fran.

Reasoning – Subregulation 1.15A(2)

53. In my view the Tribunal has considered *seriatim* the relevant factors to be taken into account when assessing the claim. It has dealt with the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons' commitment to each other. As set out in some detail earlier in this judgment the Tribunal's reasons reveal careful consideration of the claim by the Applicant. It has also taken into account in its reasons "all the circumstances of the relationship". Whilst the Applicant has been critical of the Tribunal's reasoning process I accept as submitted by the First Respondent that effectively the question for the Tribunal to consider was a question of fact. The criticisms made by the Applicant in my view appear to be addressed to the weight given by the Tribunal to the information provided rather than a challenge as a matter of law to the Tribunal's reasoning process.
54. I accept as submitted by the First Respondent that the Tribunal is not compelled to comment on every item of material before it and although not required to do so in the present case has made what I regard as substantially significant and relevant findings under each of the subheadings required by subregulation 1.15A(3) of the Regulations.
55. I otherwise accept as submitted by the First Respondent that essentially the Applicant's complaints impermissibly seek merits review.
56. When considering the financial aspects of the relationship it was a matter for the Tribunal to make an assessment of the evidence. Reference was made to the relevant evidence by the Tribunal in considering financial aspects and I accept that the Tribunal is not obliged to recite each and every aspect of that claim. I can see no error in the manner in which the Tribunal dealt with financial aspects.
57. When considering the "nature of the household" the Tribunal did no more than it was required to do by subregulation 1.15A(3)(b)(iii) which does make reference to the concept of "any sharing of responsibility for housework". The Tribunal did consider other matters when reaching its conclusion in relation to this issue. This is clearly a matter for the Tribunal and it made findings of fact in my view free of error.

58. Likewise, when the Tribunal considered the social aspects of the relationship the Tribunal referred in considerable detail to the relationship between the parties and clearly made reference, contrary to the Applicant's submissions, to the statutory declaration of Marco Fran and of the Applicant's sister. It also referred to correspondence. The Tribunal was then able to make a decision free of error based upon its findings that the sponsor's family "did not attend the wedding in Fiji". It was further able to draw a conclusion on the facts that "within a couple of months of her arrival in Australia the sponsor demonstrated a lack of interest in socialising (with the Applicant)". Having made those observations I can see no error in the Tribunal's finding that the "social aspects of the parties relationship are equivocal and do not reflect the social aspects of a spousal relationship as contemplated by regulation 1.15A".
59. The Tribunal otherwise considered carefully the nature of the persons' commitment to each other as required by subregulation 1.15A(3)(d). It specifically referred to the history of the relationship and then made a finding again free of error that it was "not satisfied that mutual commitment and emotional support were ever evident in the relationship". The significant finding it made was that it was not satisfied "that, at any point in time the sponsor had a genuine commitment to a shared life with the visa applicant in the sense contemplated by the regulations".
60. In reaching its decision I cannot see any error on the part of the Tribunal in the manner in which it has interpreted subregulation 1.15A(3) of the Regulations. I do not accept that the Tribunal has imposed any mandatory requirement that all the factors referred to in the regulation must be satisfied, or that it is assumed mutual commitment meant an equal commitment "in all aspects of the spousal relationship". It otherwise does not seem to have imposed a "minimum time" during which a mutual commitment to a spousal relationship had to exist. The extracts from the Tribunal's decision set out in detail earlier in this judgment do not in my view reveal any other error and do not reveal the Tribunal's failure to have regard to cultural differences nor do they reveal impermissible references to domestic violence.
61. Accordingly this ground should fail.

Bias

62. At the hearing of the application references were made by Counsel for the Applicant in support of the claim of apprehended bias to the tape-recording of the proceedings. The Court agreed after some discussion with the parties that the tape-recording should become an exhibit and that all parties should hear the tape-recording and make submissions. Although it may have been preferable to listen to the tape-recording in open Court, it was decided to permit both parties to make detailed submissions arising from the tape-recording and to cross-reference those submissions to the transcript which appears in the Applicant's Supplementary Court Book.
63. During the hearing and in the substantive submissions on behalf of the Applicant, it was clear that the Applicant relied upon apprehended bias rather than actual or ostensible bias. Not surprisingly when the post hearing submissions were filed and served by the Applicant seeking to argue "actual or ostensible bias" the First Respondent objected.
64. It should be noted that the detailed concerns expressed on behalf of the Applicant were unfortunately raised at a late stage in the proceedings and hence the Court as part of its case management decided to receive the tape-recording as an exhibit and to enable all parties and the Court to listen to the tape-recording after receipt of written submissions from both parties making reference to the tape-recording and as indicated the transcript.
65. As a preliminary issue it is necessary for the Court to consider whether the Applicant should be permitted to raise the suggestion of "actual or ostensible bias" rather than simply rely upon the earlier claims of "apprehended bias".
66. For reasons which will become apparent I shall deal with the submissions made for and on behalf of the Applicant including suggestions of "actual or ostensible bias" given that the Court permitted the parties to file and serve submissions arising from the tape-recording and transcript. Although the Court at that stage assumed that it would only be dealing with "apprehended bias" I am prepared to consider the submissions made for and on behalf of the Applicant which I note have been appropriately addressed in the

submissions filed after the hearing by the First Respondent. Hence, I have used the heading “Bias” when dealing with this topic rather than “Apprehended Bias”.

67. In any event both parties provided post hearing submissions and invited the Court to listen to the tape-recording. The Court has listened to the tape-recording and cross-referenced it to the transcript in order to fully understand the submissions made by the parties.
68. Before setting out the submissions made by the parties it is appropriate in my view to set out relevant authorities which do not seem to be in issue between the parties.
69. Relevant authorities were relied upon, which I accept are applicable in the present case. Reference was made to *Webb & Hay v R* (1994) 181 CLR 41 (Webb), where the court relevantly stated at 67-68 the following:

*“In a series of recent cases, the Court has formulated the test to be applied in this country in determining whether a judicial officer (“a judge”) is disqualified by reason of the appearance of bias, as distinct from proved actual bias. That test, as so formulated, is whether, in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts “might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question” in issue. The quoted words in that statement of the test are taken from the judgment of the Court in *Livesey v NSW Bar Association*.”*

70. The test in *Webb*, it was submitted and I accept, was relevantly reviewed by the High Court in *Refugee Review Tribunal, Re; Ex parte H* (2001) 179 ALR 425 at [27]-[29]:

“[27] The test for apprehended bias in relation to curial proceedings is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question to be decided.² That formulation owes much to the fact that court proceedings are held in public. There is some incongruity in formulating a test in terms of “a fair-minded lay observer” when, as is the case with the tribunal, proceedings are held in private.

[28] Perhaps it would be better, in the case of administrative proceedings held in private, to formulate the test for apprehended bias by reference to a hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias. Whether or not that be the appropriate formulation, there is, in our view, no reason to depart from the objective test of possibility, as distinct from probability, as to what will be done or what might have been done. To do otherwise, would be to risk confusion of apprehended bias with actual bias by requiring substantially the same proof.

[29] Though the test in administrative proceedings, as in curial proceedings, is, in our view, one of objective possibility, the non-curial nature of the body or tribunal in question and the different character of the proceedings must, as already indicated, be taken into account. In the present case, a significant difference between curial proceedings and the proceedings of the tribunal is that the former are adversarial and the parties are usually legally represented, whereas the latter are inquisitorial in nature and the parties are not represented.”

71. I further accept, as submitted by the First Respondent, that the allegations of the possibility of apprehended bias must be firmly established. I accept and apply the decision of the High Court in *Minister for Immigration and Multicultural Affairs; Re; Ex parte Epeabaka* (2001) 206 CLR 128, (Epeabaka) per Gleeson CJ, McHugh, Gummow and Hayne JJ, at [20], as follows:

“[20] The legal basis of the applicant's complaint, assuming it is made good, is that the members of the Tribunal are bound by the common law principles of natural justice, or procedural fairness. Those principles where they apply, include a requirement that a decision-maker be, and appear to be, capable of bringing an impartial mind to bear upon the exercise of his or her decision-making functions. In R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group this Court said:

‘The common law principles of natural justice are well understood though they have been variously expressed ...

Those requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds.’”

72. I also accept and apply the decision of Kirby J in *Epeabaka* in relation to the correct test, as submitted by the First Respondent, where His Honour states at [90] the following:

“[90] First, it must be remembered that the test for disqualification in a case such as the present is not merely a sense of unease or a feeling that conventions of discretion and prudence have been breached. Something more is required. Although the law interposes the imputed consideration of a fair minded observer and speculates on whether that person "might" (rather than "would") entertain a reasonable apprehension of bias in the particular case, the serious consequences that necessarily attend the affirmative conclusion oblige that it should be "firmly established". This reflects a recognition that decision-makers (whether in the judiciary, in adjudicative tribunals or elsewhere vested with public power) are human beings. They have foibles and personal characteristics that vary substantially, reflecting differences of view that also exist in the community at large. Being independent, such decision-makers, in their professional conduct and utterances, will often exhibit robust individuality that is characteristic of people who are obliged to make important and difficult decisions without fear or favour.”

73. Both parties accept that it is settled law and ostensible bias is not usually made out by robust or vigorous questioning. The First Respondent referred to and I apply the decision of Sackville J in *NANL v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 277 where the Court states:-

“29. The appellant’s complaint is essentially that the RRT doubted his account of events and pressed him with questions designed to test the veracity of that account. But it must be remembered that proceedings in the RRT are

inquisitorial in character (Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82, at 115 [76], per Gaudron and Gummow JJ), and that the RRT member is in the position of "an inquisitor obliged to be fair": Re Ruddock; Ex parte Applicant S154/2002 (2003) 201 ALR 437, at 450 [57], per Gummow and Heydon JJ. One element of fairness involves, or at least can involve, putting to an applicant doubts about his or her account of events and inviting comment on those doubts. In Re Refugee Review Tribunal; Ex parte H (2001) 179 ALR 425, the High Court (Gleeson CJ, Gaudron and Gummow JJ) pointed out (at 435 [30]) that where:

"credibility is in issue, the person conducting inquisitorial proceedings will necessarily have to test the evidence presented – often vigorously. Moreover, the need to ensure that the person who will be affected by the decision is accorded procedural fairness will often require that he or she be plainly confronted with matters which bear adversely on his or her credit or which bring his or her account into question. Similar questions by a judge in curial proceedings in which the parties are legally represented may more readily give rise to an apprehension of bias than in the case of inquisitorial proceedings."

74. In the light of the authorities and the accepted principles of law set out above it is appropriate to then consider the submissions by the parties in relation to the issue of bias.

Applicant's submissions

75. Initially the Applicant relied upon apprehended bias and submitted the Tribunal failed to give genuine and realistic consideration to the Applicant's case. Having misconstrued the law and having allegedly formed a view on the merits of the Applicant's case, it was argued that the Tribunal appeared to place a burden of proof upon the Applicant "to show that the relationship was genuine up until the point it broke down due to domestic violence".
76. It was argued that this is evident and arises from the following extracts from the transcript:-

“MR LENNON: It just seems - you might say with the benefit of hindsight - a bit rushed, that you met while he was on a holiday and nothing happened, you just met socially through a mutual friend, you had a couple of weeks and then he came back and there were some phone calls, and then - - -”

77. (Supplementary Court Book p.33 lines 6-9)

“MR LENNON: Some might say, "The proof of the pudding - they may have only had a few days together but here they are 25 years later still together." But actually what happened was that you joined him in Australia, or he came out again and you came back together, and within a couple of months the relationship deteriorated to the point where he was subjecting you to physical violence, which tends to suggest that perhaps you hadn't really thought it through and got to know each other and established whether or not you were compatible.

You say that it became apparent to you pretty quickly that he had a drinking problem and that he behaved in a way that was inappropriate - you know, he had friends over who'd continually use swear words, including in front of children, that he expected you to do all the housework. It seems to me that there's a real question mark over whether or not you had the kind of spousal relationship that's contemplated by the regulations, and that is one which both addresses all those points about financial, household on the like, but in ways they're less important than the last factor in the definition of "spouse", which is that there's a mutual commitment to a shared life together and that there's companionship and mutual support.

It seems to me that your time in Australia has - I mean, there wasn't a lot of mutual support. You may have been supporting him, doing all the housework, but he wasn't supporting you. He was drinking, watching TV and ignoring your needs as someone who's recently arrived in Australia and his new wife. He seems to be more interested in having his mates around and drinking and watching TV than being a supportive spouse. Would that be right?”

(Supplementary Court Book p.34 lines 10-35)

“MR LENNON: That's what I'm saying. We're in heated agreement. He was prepared to support you when it suited him, like going out and having a good time and all that, but when it was inconvenient - and that's the very essence of commitment. It's not just having holidays in Fiji and enjoying each other's

company socially at restaurants and other things. It's about, you know, being there when your partner needs you, and you've told me that in fact there were times when you were overburdened with work and everything and he just ignored you.

MS RAM: No, he didn't. That's a fact."

78. (Supplementary Court Book p.35 lines 5-13)

79. It was argued the Tribunal focused on minor discrepancies.
80. In the detailed post hearing submissions the Applicant after referring to relevant authorities sought to argue that the Tribunal at the hearing on 19 April 2006 had *"formed a negative view of the Applicant's case"*.
81. Whilst accepting that the Tribunal may have certain views and experience influencing the way information is processed, it was otherwise submitted that "the Tribunal's 'baggage' of preconceptions about how modern spouses should conduct their relationships was so rigid that it led the Tribunal to form a view of the Applicant's case that was not amenable to change regardless of the evidence presented to the Tribunal by the Applicant either by way of documents relating to a spousal relationship or orally at the hearing held on 19 April 2006".
82. It was argued that the prejudgment led the Tribunal to misconstrue the law and misapprehend its task and reference was made to earlier submissions.
83. The Applicant appeared to rely upon a document entitled, "Member Code of Conduct" dated January 2006 and whilst acknowledging the document post dated the Tribunal hearing sought to rely upon general principles set out in that document. It was argued the Tribunal failed to avoid bias and "failed to conduct the hearing in a non-threatening, sensitive manner".
84. A number of examples were given from the transcript which I briefly summarise as follows:-
- Shortly after the commencement of the hearing and after discussing the history of the relationship "the Tribunal interrupted the Applicant's testimony concerning her spouse's children with a question that was totally irrelevant to that testimony and its

previous line of questioning by asking whether the relationship was genuine or whether the Applicant had entered into it ‘more as a way of coming to Australia’” (SCB p.7 lines 11-17). This was submitted to a question intended to “rattle” the Applicant

- The Tribunal’s questions appeared to be designed to ‘catch the Applicant out’ by repeating the same question in the context of different parts of the Applicant’s testimony which had the effect of confusing the Applicant and upsetting her to the point of becoming tearful
- Reference was made to the Supplementary Court Book and to what is described as “aggressive questioning leading the Applicant’s voice to tremor and revealing that the Applicant was “stressed and on the verge of tears”. Reference was made to “the Tribunal displeasure was evident in its tone and words”. Detailed reference was provided to the Supplementary Court Book to support the submission
- The tone of the Tribunal could not be regarded as “sensitive” or “respectful” or culturally aware particularly in the context of domestic violence and what was claimed to be the “stress, embarrassment and stigma that its victims are known to suffer.” Again reference was made to extracts in the Supplementary Court Book.
- The Tribunal it was claimed used domestic violence as a basis for impugning the relationship. Again reference was made to the Tribunal’s decision and the questioning set out in the transcript.
- It was argued that evidence of bias existed in the Tribunal’s “rigidly determined views” where “the Tribunal made it quite clear that it found it difficult to believe that the couple would marry so quickly after they met ...” That rigid view ignored it was argued the Applicant’s evidence concerning the couple’s efforts to repair the relationship, how they socialised together with family and friends, the Applicant’s detailed knowledge of the husband’s family, the way they shared household expenses and the way they accessed each other’s bank accounts.

First Respondent's submissions

85. The First Respondent after referring to the relevant authorities submitted that there was nothing in the Tribunal's approach to establish that it acted in the manner suggestive of some prejudgment or that a fair minded and informed person might reasonably apprehend that the Tribunal might not have brought an impartial mind to the consideration of the application.
86. The First Respondent referred in detail to the post hearing submissions of the Applicant. It was argued that on a proper reading of the transcript and listening to the tape-recording that the Tribunal did not at any time "become threatening or intimidating or belligerent by the member's tone of voice or in any other respect".
87. It was otherwise argued that the Tribunal throughout the course of the transcript confronted the Applicant with doubts it had about the case and it was "for the Tribunal as the inquisitor to put matters as and when it deemed appropriate". It was argued that it cannot be said "to be inappropriate to put a central issue to an Applicant early on in the hearing". This does not indicate it was argued an apprehension of bias.
88. It was specifically submitted that the Tribunal was "not seeking to catch the Applicant out". References in the transcript should properly be regarded as "simply part of the Tribunal's questioning of the Applicant regarding when the violence began". The Tribunal's questioning was not aggressive and it was argued the Tribunal did not "pounce" on any inconsistency but "simply pointed out to the Applicant that an answer given was inconsistent with the prior answer given."
89. The mere fact it was argued that the Applicant may have appeared distressed throughout the proceeding does not of itself indicate jurisdictional error. Reference was made to the decision of *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB* (2004) 207 ALR 12 where the Court states at pp.49-50 the following:-

"... The third alleged error presupposes that there is some competency requirement as to the satisfaction of which the tribunal must be convinced before an applicant can take part or continue to take part in proceedings before the tribunal. This

assumption is without foundation. The Act does not provide for any such competency requirement, analogous, for example, to that of fitness to plead. ...

[126] This should also be said about stressed witnesses. They are by no means rarely encountered in courts and tribunals. Legal and inquisitorial proceedings can be very stressful occasions even for people who have no direct interest in their outcome. That a witness or a party may be stressed will rarely of itself constitute sufficient reason to postpone a hearing. Whether a party or a witness is so stressed as to be unable to give a reasonable account of himself or herself, or whether further inquiries as to the capacity of a person to do so should be made, is pre-eminently a matter for the court or the tribunal to decide, and courts and tribunals by experience are generally well equipped to do so.”

90. It was specifically submitted that the hearing tape “reveals the whole of the hearing was conducted in a ‘sensitive’ and ‘respectful’ manner”.
91. The reference by the Tribunal to the issue of domestic violence relating to credit is not of itself a basis for the Court to conclude that there was bias. The Tribunal it was submitted gave “the Applicant every opportunity to put whatever she wanted to, to the Tribunal”.
92. It was otherwise argued the Tribunal did not ignore the Applicant’s evidence and did not engage in what was described by the Applicant as “continuous use of multi-barrelled and leading questions and promptings to get the Applicant to agree with the propositions put in certain critical questions”. The Tribunal it was argued “simply carried out its function in the required inquisitorial manner as the hearing tape reveals”.

Reasoning

93. I have read carefully the extracts from the transcript referred to in support of the Applicant’s submissions and listened to the tape-recording of the proceedings before the Tribunal.
94. It should be noted as submitted by the First Respondent that in undertaking judicial review it is relevant to have regard to and apply

the statement of Crennan J in *Woods v Migration Agent's Registration Authority* [2004] FCA 1622 where Her Honour states:-

“55 *The reasons of an administrative decision-maker should not be scrutinized in an over zealous fashion in order to glean some inadequacy in the way the reasons are expressed: Minister for Immigration and Multicultural Affairs v Wu Shan Liang* (1996)185 CLR 259 at 272. Whether the Tribunal failed to give proper consideration to the evidence before it is a question of fact not one of law: *Birdseye v Australian Securities & Investment Commission* (2003) 76 ALD 321; *Australian Securities & Investment Commission v Saxby Bridge Financial Planning Pty Ltd* (2003) 133 FCR 290 at [152]. Where a tribunal makes a wrong finding of fact within the jurisdiction, there is no error of law: *ABT v Bond* at 355-356; see also *Federal Commissioner of Taxation v Raptis* (1989) 20 ATR 1262 at 1263 per Gummow J. It should only be in exceptional cases where there is a clear case that there was no evidence to support a particular conclusion that the court should undertake the exercise of evaluating the evidence in circumstances where the Tribunal is the ultimate determiner of facts: *Parks Holdings* at [62]. This is not a case where there is no evidence to support a conclusion of fact nor was it a case where the conclusions drawn could be said not to have been open to the Tribunal. It is not a jurisdictional error for an administrative decision-maker to fail to refer to a piece of evidence: *Ping, L.S. and Anor v Minister for Immigration, Local Government & Ethnic Affairs* (1994) 35 ALD 225 at 236 per Carr J. (Sheppard and Gummow JJ agreeing).

56 *A Tribunal is not required to set out in its reasons a line-by-line refutation of the evidence led by the applicant which is contrary to its findings or conclusions: see Re MIMA; Ex parte Durairajasingham* (2002) 168 ALR 407 at 422-423 per McHugh J. The Tribunal had regard to the evidence and made findings of fact, which were open to it and were not perverse. The Tribunal undertook the task of determining the facts without error in accordance with the principles referred to in the abovementioned authorities.”

95. In addition to the authorities set out earlier and the principles of law which I have recited I should add that the suggestion of bias is a serious issue which when raised should be supported by clear reference to the material establishing a legal basis for the claim of bias.

96. In the present case I am not satisfied that there is any material to substantiate a claim of actual or ostensible bias. There is nothing before me to suggest ostensible bias as at best the references in the transcript and on the tape-recording only suggest what might be described as the Tribunal testing the evidence presented albeit on occasions “vigorously”.
97. It is not sufficient for the Court to simply rely upon an Applicant’s submission that an assumption should be made that the Tribunal had formed a negative view of an Applicant’s case merely on the basis of the questioning process. On my reading of the transcript it is not evident that the Tribunal did anything more than explore the claims made by the Applicant. I do not accept that the questioning reveals any preconceived view held by the Tribunal towards the Applicant’s claim.
98. The Tribunal is entitled to apply its own analysis to the claim and is not required to have regard to perceptions of others when reaching its decision. In this case during the course of submissions some reference was made to a decision by a delegate in relation to another visa of the Applicant which in my view is clearly irrelevant and should not have been taken into account by the Tribunal. The Tribunal itself however on a proper reading of the transcript and its reasons for decision has simply embarked upon its fact finding mission in a way which does not reveal in my view any evidence of ostensible or actual bias.
99. That leaves the question of whether or not there has been an apprehension of bias. Again, I refer to the relevant authorities to which reference was made earlier in this judgment.
100. On my reading of the transcript I do not accept that apprehension of bias arises from the word used by the Tribunal when it explored the claim made on behalf of the Applicant. There is no error made by a Tribunal in addressing at an early stage of the proceedings a core issue regarded as relevant to the proceedings. For reasons given earlier in this judgment I do not accept that the manner in which the Tribunal approached its task including the manner in which it dealt with domestic violence reveals jurisdictional error. Likewise, I do not accept the Applicant’s submissions that the manner in which the Tribunal embarked upon its task of assessing the claim revealed grounds supporting a claim of apprehended bias.

101. As indicated earlier in this judgment the Tribunal dealt with the relevant factors in order and to the extent that it may have referred to domestic violence in assessing the genuineness of the spousal relationship by means of assessing credibility it has not committed error. In my view it did not have to confine itself to the issue of credibility when considering domestic violence but may have considered claims of domestic violence in assessing whether the spousal relationship was genuine.
102. I have carefully considered the submissions made by the parties in relation to the transcript of evidence before the Tribunal and have listened to the tape-recording of those proceedings. A number of observations may readily be made after listening to the tape-recording. In my view the Tribunal member has conducted the hearing in what I consider to be an impeccable manner. The proceedings were conducted in a sensitive, calm and considered manner. I could detect nothing in the tone of the Tribunal member to suggest undue aggression. On occasion there was vigorous questioning in relation to significant issues. That questioning however was undertaken without undue aggression or anger.
103. The overall impression which I gained from listening to the tape-recording was that the Tribunal member pursued, sometimes with a degree of persistence, perceived inconsistencies in the Applicant's claim. The pursuit of inconsistencies by a Tribunal member is entirely appropriate and in my view in the present case there is no demonstrable error in the method of questioning adopted by the Tribunal member.
104. The mere fact that an Applicant may appear as in the present case to be upset particularly towards the end of the Tribunal hearing does not of itself provide any or any adequate basis upon which the Court is able to conclude that the Tribunal member was biased toward the Applicant. In fact on my assessment of the Tribunal hearing it is clear to me that the Tribunal member has remained polite and courteous throughout the hearing process. At the commencement of the hearing the Tribunal member made clear to the Applicant the process to be undertaken. There are a number of questions asked by way of background and the Applicant appeared to respond appropriately and in a manner free of any claimed stress or upset.

105. It is instructive to note that it was not until page 7 of the transcript that the following exchange occurred:-

“MR LENNON: Was it a genuine relationship? Was it a real relationship or - - -

MS RAM: Yes.

MR LENNON: Or was it a relationship that you entered into more as a way of coming to Australia?

MS RAM: No, if that was the case, I have been travelling - have a look at my passport. I've been a regular traveller to Australia, in and out, so I don't see any reason. It was genuine.

MR LENNON: Yes, but you were only on visitor's visas whereas this was an opportunity to get a permanent visa.

MS RAM: That was not my reason. It was a genuine relationship.”

106. (Supplementary Court Book p.7 lines 11-26)

107. Those questions were asked in a calm, polite and courteous manner. The questions however were direct and appropriate.
108. The Tribunal then proceeded to ask questions concerning the relationship when it first commenced. Other questions were asked in a reasonable manner concerning the Applicant's employment. The following exchange occurred in relation to the claim of domestic violence:

“MR LENNON: Yes, but why didn't you say then what you're now saying by statutory declaration? You're now making very serious allegations against Mr Van Essen on a statutory declaration and submitting them to this tribunal, but you didn't make any reference to any of that in your interview in March 2004.

MS RAM: Because I wasn't asked anything about if these things were happening.

MR LENNON: But you were asked about the relationship. You were asked to explain the relationship and you didn't make any mention of any of these matters.

MS RAM: Because that's when everything was - even after he withdraw sponsorship and everything, we were sorting things slowly after seeing the counsellor.

MR LENNON: If you were experiencing all these difficulties and then you were invited to an interview and the very subject of the interview was the nature of your relationship, to describe what your relationship was like and"

109. (Supplementary Court Book p.17 lines 25 -43)

"how you were getting on, then it would have been an opportunity to say, "Well, this is what's happening."

MS RAM: I was told not to say anything that things were fine, "Everything is going to be fine."

MR LENNON: You told the officer that you still cared for him?

MS RAM: Yes, and I did. Both of us thought, we can deal with these problems. We're sorting things out, ironing problems out. We still cared about each other, even during that time.

MR LENNON: Even though he'd been treating you like that?"

110. (Supplementary Court Book p.18 lines 1-14)

111. The extracts set out above reveal that the Tribunal pursued a line of questioning which was entirely appropriate. It did so on my assessment of the tape-recording in a polite and courteous manner.
112. One issue that arose during the course of submissions was the claimed admonishment by the Tribunal of the Applicant's agent. It is appropriate to set out the following extract from the transcript:-

"MS RAM: Yes. But then initially when we moved in, like when I came over here - that would have been December 2003 - he did really hit me hard and actually it was about midnight or nearly midnight that I was pushed outside the back door. I was just trying to get ready to go to bed and half-naked or in my underpants.

MR LENNON: In December 2 thousand and?

MS RAM: 3.

MR LENNON: When you'd only been here a month?

MS RAM: Yes.

MR LENNON: Before you said that his violence and the problems started three months after you arrived. I don't understand it.

MR DRONJIC: December 2004.

MR LENNON: That's all right.

MR DRONJIC: I'm assisting my client (indistinct)

MR LENNON: No, what you did was you interjected when I asked a question of the applicant. I said at the start the applicant - Ms Ram, if you're not sure about question, let me know and I'll repeat the question and clarify it for you.

MS RAM: Okay, yes.

MR LENNON: But, Mr Dronjic, it's not your role to provide suggestions as to how the applicant should answer questions. What did you tell her?

MR DRONJIC: I've just - - -

MS RAM: That it was December 2004.

MR DRONJIC: I've mentioned that that was in December 2004, and she'd already stated that.

MR LENNON: That's for her to clarify with me. It's an inconsistency that I was exploring.

MR DRONJIC: Okay."

113. (Supplementary Court Book p.18 lines 39-43 and p.19 lines 1-36)

114. In my view that exchange between the Tribunal member and the agent was entirely reasonable. Again, upon listening to the tape-recording I am satisfied that whilst the Tribunal member may have sounded "firm" towards the agent, the comments made were entirely appropriate. Indeed if the comments were made in a Court of law directed towards Counsel who had interrupted during the course of evidence then one suspects the admonishment may have been far more severe. In this instance it was appropriate for the Tribunal to remember to remind the agent that it is not the agent's role to provide information when the

Tribunal had embarked upon an appropriate questioning of the Applicant. It was evident thereafter that the Applicant then having been prompted by the agent corrected her evidence to claim that the incident occurred in 2004 and not 2003. The Tribunal member then appropriately pursued the matter further as the following exchange reveals:-

“MR LENNON: Yes, but you said earlier December 2003, and now I've pursued that and I asked you whether that was just within a month of your arrival.

MS RAM: Now, unfortunately should have been 2004.

MR LENNON: All right. But you did say, when I said, "Was that a month after your arrival?" - you said, "Yes."

MS RAM: Well, it wasn't.

MR LENNON: Why did you say that?

MS RAM: Because it's a slip of the tongue. I mean, I just got the year wrong. It should have been 2004 instead of 2003.

MR LENNON: So when was the first time he assaulted you?

MS RAM: It was somewhere in February 2004.

MR LENNON: What happened in December 2004?

MS RAM: December? That was on the 7th actually. That's when I was going to bed and I was still getting changed and he dragged me outside and just pushed me outside, because where we were in the flat, there's no like grass or anything. It's all concrete, and he pushed me there through the back door, and I was there for at least 45 minutes before he opened the door for me, because he had been drinking and that was a weekend, I think. Saturday night or Friday night it was.

MR LENNON: I'm just reading the interview notes, the interview on 2 June 2005. There's no mention of that attack in December 2004.

MS RAM: I didn't call the police or anything, plus - - -“

(Supplementary Court Book p.20 lines 6-41)

115. I see nothing untoward about that line of questioning based as it was on the Tribunal's reference to interview notes compared with the material provided to the Tribunal by the Applicant.
116. The Tribunal then further pursues the issue in an appropriate manner concerning whether the Applicant applied for a restraining order as the following exchange reveals:-

“MR LENNON: Did you apply for a restraining order or anything like that?”

MS RAM: No, I didn't know I could do that. I didn't know what my rights were.

MR LENNON: You must have known that you had some rights, though, in a situation like that. No-one deserves to be treated like that.

MS RAM: I wasn't aware that I could do that until later. I found out that I could, yes.

MR LENNON: Did the police not advise you about that?

MS RAM: No. Whenever they came he would say, "Sorry, we have got everything sorted out," so they used to go and I used to think, "This thing is not going to happen again." But it kept on, so I had to call them again, four times."

117. (Supplementary Court Book p.21 lines 15-30)

118. The tape-recording reveals that the Tribunal when stating “no one deserves to be treated like that” did so in a polite, courteous and sensitive manner.
119. Earlier in the hearing the Tribunal had otherwise pursued what might be regarded as appropriate and basic questions in relation to the financial circumstances of the parties.
120. To illustrate the courtesy extended by the Tribunal to the Applicant I note that part of the transcript appears to be deficient. At one point the Applicant states, “Just bear with me” when asked about when she had consulted a social worker (Supplementary Court Book p.23 line 29). The tape-recording reveals that after uttering those words the Tribunal member in a quiet and calm voice states, “that’s alright”.

121. Further during the Tribunal hearing it is clear that the Tribunal member did interrupt the Applicant when the Applicant was observed to be reading from a statutory declaration. The following exchange occurred:-

“MR LENNON: Aren't you reading there from - is that your statutory declaration?”

MS RAM: Yes.

MR LENNON: Do you want to put that to one side just for a minute. If you need to refresh your memory you can refer to them, but I'd just like to ask you from your own memory what happened without referring to your notes. What happened on 12 December?”

(Supplementary Court Book p.26 lines 34-42)

122. I see nothing wrong with the Tribunal member reminding an Applicant to provide information from her own memory rather than referring to notes. The tape-recording reveals that the interruption was undertaken in a polite and courteous manner and I could detect no change in the tone used by the Tribunal member throughout that exchange.

123. The following further exchange was the subject of submissions:-

“MR LENNON: It just seems - you might say with the benefit of hindsight - a bit rushed, that you met while he was on a holiday and nothing happened, you just met socially through a mutual friend, you had a couple of weeks and then he came back and there were some phone calls, and then - - -

MS RAM: It was after a couple of months that he came back.

MR LENNON: Yes. He returned to Fiji and you got married. That seems very rushed. I mean, you hadn't had a relationship in April 2003. That was just friends. But he went back to Australia and, yes, I understand there were phone calls and letters and cards and an evolving friendship and closeness.

MS RAM: Yes.”

(Supplementary Court Book p.33 lines 6-16)

124. In that exchange the Tribunal member has put to the Applicant very clearly concerns it may have had about the relationship. It did so in a

manner which in my view does not demonstrate any suggestion of bias. Instead the Tribunal member gave considerable detail further in the hearing about the relationship in the following extract:-

“You say that it became apparent to you pretty quickly that he had a drinking problem and that he behaved in a way that was inappropriate - you know, he had friends over who'd continually use swear words, including in front of children, that he expected you to do all the housework. It seems to me that there's a real question mark over whether or not you had the kind of spousal relationship that's contemplated by the regulations, and that is one which both addresses all those points about financial, household on the like, but in ways they're less important than the last factor in the definition of "spouse", which is that there's a mutual commitment to a shared life together and that there's companionship and mutual support.

It seems to me that your time in Australia has - I mean, there wasn't a lot of mutual support. You may have been supporting him, doing all the housework, but he wasn't supporting you. He was drinking, watching TV and ignoring your needs as someone who's recently arrived in Australia and his new wife. He seems to be more interested in having his mates around and drinking and watching TV than being a supportive spouse. Would that be right?

125. (Supplementary Court Book p.34 lines 10-35)

126. Upon my reading of the transcript and listening to the tape-recording despite the fact that the Applicant appears to be upset and at certain times audibly heard to be “sniffing” and “crying” particularly towards the end of the interview, I am otherwise satisfied that the Applicant was able to provide responsive answers to direct questions properly put to her by the Tribunal.
127. My overall assessment of the transcript and tape-recording is that the Tribunal conducted itself as indicated earlier in an impeccable manner. I am not satisfied that there is any basis upon which the Court is able to conclude that the Tribunal member was biased. To avoid any doubt I am certainly not satisfied that there is any evidence of apprehended bias nor indeed evidence of actual or ostensible bias.
128. It follows therefore that this ground should fail.

Conclusion

129. For the reasons given it follows that the application should be dismissed with costs.

I certify that the preceding one hundred and twenty (120) paragraphs are a true copy of the reasons for judgment of McInnis FM

Associate:

Date: 17 August 2007